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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

T-MOBILE USA, INC.,

Petitioner,

v.

KATHLEEN LOWDEN AND JOHN MAHOWALD, INDIVIDUALLY AND ON BEHALF OF ALL THE MEMBERS OF THE CLASS OF PERSONS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this petition for certiorari should be held pending this Court's disposition of the petition for certiorari previously filed in *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), given that both cases present the same important question:

Whether, under the Federal Arbitration Act, a federal court may refuse to enforce the terms of an agreement to arbitrate based upon a state-law policy that individual arbitration is unconscionable in cases involving small claims by a consumer.

LIST OF PARTIES AND AFFILIATES

Pursuant to Rule 29.6 of the Rules of this Court, T-Mobile USA, Inc., states that it is a wholly-owned subsidiary of T-Mobile Global Holding GmbH, which is a wholly-owned subsidiary of T-Mobile International AG, which, in turn, is a wholly-owned subsidiary of Deutsche Telekom AG. Deutsche Telekom AG is a publicly-traded company, of which approximately 14.83% and 16.87% is owned by the Federal Republic of Germany and the Kreditanstalt für Wiederaufbau (a bank controlled by the Government of the Federal Republic of Germany), respectively. No other publicly-held company owns 10% or more of T-Mobile USA, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner T-Mobile USA, Inc. ("T-Mobile"), respectfully requests that this Court grant the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States District Court for the Western District of Washington denying T-Mobile's motion to compel arbitration is unreported and is reproduced in the Appendix to this Petition ("Pet. App.") at 18a-38a. The opinion of the Ninth Circuit affirming the district court is reported at 512 F.3d 1213 and is reproduced at Pet. App. 1a-17a.

JURISDICTION

Plaintiffs originally filed this lawsuit in the Superior Court of Washington in and for King County. T-Mobile removed the action to federal court in August 2005. The district court had jurisdiction under 28 U.S.C. §§ 1332(d) and 1453. The Ninth Circuit, which rendered its decision below on January 22, 2008, had appellate jurisdiction over the district court's denial of T-Mobile's motion to compel arbitration under 9 U.S.C. § 16(a)(1). T-Mobile invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides in pertinent part:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter

> arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or equity for the revocation of any contract.

STATEMENT OF THE CASE

This case presents the recurring question whether Section 2 of the Federal Arbitration Act ("FAA") permits federal courts to refuse to enforce private agreements that expressly preclude class-based arbitration because state law deems agreements requiring individual arbitration of consumer claims to be substantively unconscionable. The petition for certiorari in *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), presents the same question. For the reasons fully set forth in the petition in *Laster*, the question presented warrants the grant of certiorari. Accordingly, petitioner respectfully requests that this case be held pending disposition of the petition in *Laster* and resolved consistent with that petition.[1]

Respondents Kathleen Lowden, through her former spouse, and John Mahowald were T-Mobile subscribers who each entered into contracts agreeing to resolve any disputes with T-Mobile through individual arbitration. Notwithstanding those agreements, they filed a class action on behalf of themselves and all similarly situated United States consumers claiming that petitioner violated Washington state law by charging Universal Service Fund fees in addition to advertised prices, and by allegedly billing customers for telephone calls made

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[1] In addition, the same issue also is presented and has been briefed in *T-Mobile USA, Inc.* v. *Ford*, No. 07-1103 (filed Feb. 22, 2008).

during a different billing period or for unspecified calls that had been advertised as being free of charge.

The court below, applying prior Ninth Circuit and Washington Supreme Court precedent in *Shroyer* v. *New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007), and *Scott* v. *Cingular Wireless*, 161 P.3d 1000 (Wash. 2007), held that respondents' agreement to arbitrate individually was unenforceable because it did not permit class-wide arbitration.

As set forth in T-Mobile's pending petition for certiorari in *Laster* (No. 07-976), such decisions conflict with the Third Circuit's ruling in *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007). There, the Third Circuit, relying on this Court's decision in *Perry* v. *Thomas*, 482 U.S. 483 (1987), ruled that the FAA precludes a court from refusing to enforce an agreement to arbitrate individually based upon a state-law determination that individual arbitration of small consumer claims is unconscionable. 511 F.3d at 395. The *Gay* court concluded that the FAA preempts state unconscionability standards to the extent that they would render individual arbitration unenforceable. Denying enforcement on those grounds, the Third Circuit explained, would be tantamount to "'rely[ing] on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'" *Id.* (quoting *Perry*, 482 U.S. at 492 n.9).[2]

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[2] The *Gay* decision builds on decisions by other federal circuits holding that individual arbitration is appropriate for resolving federal and state claims by consumers in cases involving relatively small individual amounts. *See Johnson* v. *West Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000); *accord Jenkins* v. *First Am. Cash Advance*, 400 F.3d 868, 878 (11th Cir. 2005), *cert. denied*, 546 U.S. 1214 (2006); *Livingston* v. *Associates Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003); *Snowden*

The Ninth Circuit in its ruling below expressly declined "to follow the Third Circuit's holding in *Gay*." Pet. App. 17a n.3. And, more recently, a majority of the Supreme Court of North Carolina followed the approach staked out by the Ninth Circuit and other courts in striking down an arbitration agreement that required individual arbitration. *Tillman* v. *Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008). The dissent in *Tillman* would have upheld the agreement to arbitrate based on the Third Circuit's reasoning in *Gay*. *Id.* at 387 (Newby, J., dissenting).

This case, like the ruling in *Laster*, implicates the same conflict over the enforceability of agreements to arbitrate consumer claims individually. In the ruling below, the Ninth Circuit applied *Shroyer* to hold that the FAA does not mandate enforcement of these agreements. Pet. App. 12a-17a. In contrast, the Third Circuit in *Gay* ruled that the FAA does require enforcement of agreements requiring individual arbitration of consumer claims and thus preempts state law to the contrary. Moreover, the Third, Fourth, Seventh, and Eleventh Circuits all have held – unlike the decision below – that individual arbitration allows for the effective resolution of claims in cases involving consumers. See Pet'n for Certiorari at 11-25, *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008).

Resolution of this conflict is necessary because the proper application of the FAA to consumer arbitration agreements presents a recurring issue of fundamental and national importance. The enforceability of agreements to arbitrate under the FAA

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v. CheckPoint Check Cashing, 290 F.3d 631, 638-39 (4th Cir. 2002); *Randolph* v. *Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001).

affects the rights of tens of millions of consumers and businesses. Indeed, a state-law rule that arbitration must provide a class-wide mechanism for resolving disputes directly undercuts the benefit of arbitration as a streamlined, low-cost *alternative* to litigation. Decisions by courts that invalidate the terms of these arbitration agreements undermine the "primary purpose" of the FAA: to counteract judicial hostility to arbitration and to ensure that arbitration remains a viable alternative to litigation through enforcement of agreements to arbitrate in accordance with their terms. See *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989); 9 U.S.C. § 4; see also Pet'n for Certiorari at 25-29, *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008).

Petitioner requests that this case be held pending the disposition of the petition for certiorari in *Laster*, No. 07-976 (filed Jan. 23, 2008), and resolved as appropriate in light of that disposition.

STATUTORY BACKGROUND

In 1925, Congress enacted the FAA in response "to hostility of American courts to the enforcement of arbitration agreements." *Circuit City Stores* v. *Adams*, 532 U.S. 105, 111 (2001). Congress sought to promote arbitration as a meaningful alternative to litigation. "[B]y agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Indeed, "it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts [parties] to forgo access to judicial remedies." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). For that reason, "Congress, when enacting [the FAA],

had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995).

The "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989). Arbitration agreements must be "rigorously enforce[d]" even if "the result is 'piecemeal' litigation." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Indeed, Section 2 of the FAA "compels judicial enforcement of a wide range of written arbitration agreements," *Circuit City*, 532 U.S. at 111, "'notwithstanding any state substantive or procedural policies to the contrary.'" *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987) (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); see also *Preston* v. *Ferrer*, __ U.S. __, 128 S. Ct. 978, 983 (2008).

Under the FAA, "the underlying issue of arbitrability" is "a question of substantive federal law," *Southland Corp.* v. *Keating*, 465 U.S. 1, 12 (1984), that "must be addressed with a healthy regard for the federal policy favoring arbitration," *Moses H. Cone*, 460 U.S. at 24. In determining whether an agreement to arbitrate is enforceable, "the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law." *Perry*, 482 U.S. at 492 n.9. As explained in *Perry*, "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law* 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Id.* (quoting 9 U.S.C. § 2) (internal citation omitted; emphasis added by Court). "[S]tate law . . . is applicable *if* that law arose to govern issues

concerning the validity, revocability, and enforceability of contracts generally." *Id.* at 493 n.9.

"Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs. Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); see *Perry*, 482 U.S. at 493 n.9. Likewise, courts may not (i) refuse enforcement based on state laws applicable only to certain types or categories of contracts, *Southland*, 465 U.S. at 16 n.11, or (ii) rely upon a fundamental aspect of arbitration as a basis for a ruling that arbitration is unconscionable, *Perry*, 482 U.S. at 493 n.9.

FACTUAL BACKGROUND

Petitioner T-Mobile markets and sells wireless telecommunications services, phones, and accessories throughout the United States. The Federal Communications Commission long has required T-Mobile to pay a Universal Service Fund ("USF") fee, and T-Mobile at times has passed through USF fees on customer bills in accordance with FCC guidance. See 9th Cir. Excerpts of Record ("ER") at 19. In addition, T-Mobile sometimes charges customers for calls on a per-minute basis when they have exceeded their allotted minutes and may also charge additional fees for certain calls. *Id.* at 20.

a. In or about July 2000, the then-husband of respondent Kathleen Lowden ("Lowden") initiated wireless service with T-Mobile's predecessor in interest, VoiceStream Wireless, and at that time signed a service agreement with the company. ER 31, 109. Immediately above Lowden's former husband's signature, the agreement states: "**Disputes are subject to mandatory arbitration pursuant to paragraph 19.**" ER 109 (emphasis in original). The terms and conditions of service are set forth in

full on the back of the signed service agreement. ER 35.

In or about April 2002, respondent John Mahowald ("Mahowald") also initiated service with VoiceStream Wireless, and, as the district court found, he too signed the then-applicable service agreement. Pet. App. 25a; ER 31. Just above the purchaser's signature, the agreement states: "**Disputes are subject to mandatory arbitration in accordance with paragraph 3 on the reverse.**" ER 32 (emphasis in original). The full terms and conditions appear on the reverse of the agreement. *Id.*

In or about September 2005, after this case was filed, Mahowald again signed a T-Mobile service agreement. ER 112-13. A few lines above Mahowald's signature, the agreement states:

> I UNDERSTAND THAT THE SERVICE AGREEMENT AFFECTS MY AND T-MOBILE'S LEGAL RIGHTS. AMONG OTHER THINGS, IT:
>
> - **REQUIRES MANDATORY ARBITRATION OF DISPUTES;**
> - **REQUIRES MANDATORY WAIVER OF THE RIGHT TO JURY TRIAL AND WAIVER OF ANY ABILITY TO PARTICIPATE IN A CLASS ACTION**[.]

ER 113 (emphasis in original).

In addition to being incorporated in the service agreements, ER 32, the then-current version of the companies' terms and conditions were enclosed in the boxes containing each new phone that respondents acquired. ER 31, 32, 34, 36. Each version of the terms and conditions explicitly stated that by activating wireless service, respondents acknow-

ledged that they had read and agreed to the terms and conditions. ER 39, 40, 69, 109, 110, 113. Each version of the terms and conditions provided respondents with ample opportunity to cancel service without paying any cancellation fee. ER 40, 69, 110, 113. Respondents chose to keep the phones, to continue their T-Mobile service, and to accept the corresponding terms and conditions. See ER 31.

Each version of the terms and conditions to which respondents agreed sets forth an arbitration agreement that requires that all parties to the contract pursue any claims in arbitration on an individual, not class, basis. For example, the version to which respondent Mahowald agreed in 2005 provides that the arbitration clause is governed by "the Federal Arbitration Act and federal arbitration law" and that "[n]either you nor we may be a representative of other potential claimants or a class of potential claimants in any dispute, nor may two or more individuals' disputes be consolidated or otherwise determined in one proceeding." Pet. App. 41a-42a. The other arbitration clauses at issue all contained similar provisions. See Pet. App. 39a-40a, 44a.

b. Notwithstanding respondents' agreements to arbitrate any disputes with T-Mobile on an individual basis, in July 2005, they filed a class action in Washington state court on behalf of three proposed nationwide classes of T-Mobile customers: (i) those who were allegedly charged USF fees; (ii) those who were allegedly charged for calls made during a billing period other than the period in which the calls were made; and (iii) those who were allegedly charged additional fees for certain calls that were supposed to be free of charge. ER 2. Respondents alleged breach of contract and violation of the Washington

Consumer Protection Act arising from the assessment of such costs and fees. ER 10-15. They sought injunctive relief, restitution, "[t]reble, exemplary or punitive damages," pre-judgment interest, and attorney's fees and litigation expenses. ER 15-16.

c. After removal to federal court, petitioner moved to compel arbitration under the FAA. Pet. App. 18a. On April 13, 2006, the district court denied T-Mobile's motion, ruling that the arbitration agreement was substantively unconscionable under Washington state law because it required individual arbitration. Pet. App. 29a-31a. Although the court acknowledged that Washington courts previously had enforced arbitration agreements that "effectively prevent class relief," *id.* at 29a, the court ruled that the class action waivers in the T-Mobile and VoiceStream arbitration agreements would prevent respondents from effectively vindicating their rights under the state consumer protection act. Pet. App. 30a (citing *Luna* v. *Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1179 (W.D. Wash. 2002) and *Mendez* v. *Palm Harbor Homes*, 45 P.3d 594, 605 (Wash. App. 2002)):

The court rejected respondents' arguments that the agreements were procedurally unconscionable, finding that respondents "had a meaningful choice with respect to whether or not to enter into the agreements." Pet. App. 38a. The court observed that respondents had "as much time as they wanted to consider the agreements," *id.* at 27a, and that the arbitration provisions were "not hidden in a 'maze of fine print.'" *Id.* at 28a (quoting *Adler* v. *Fred Lind Manor*, 103 P.3d 773, 784 (Wash. 2004)). Notwithstanding these findings, the court deemed the arbitration agreements unenforceable based on their

supposed substantive unconscionability. Pet. App. 37a-38a.[3]

d. The Ninth Circuit affirmed. It concluded that the arbitration agreements were "indistinguishable in all material respects" from an individual arbitration agreement that the Washington Supreme Court had rejected in a ruling issued after the district court's decision here. Pet. App. 11a (citing *Scott* v. *Cingular Wireless*, 161 P.3d 1000 (Wash. 2007)). It therefore held that the parties' agreements, like the agreement in *Scott*, were substantively unconscionable because they barred class actions, "'in effect . . . exculpat[ing] [defendant] from legal liability for any wrong where the cost of pursuit outweighs the potential amount of recovery.'" Pet. App. 10a (omission in original) (quoting *Scott*, 161 P.3d at 1007). The court also ruled that the parties' arbitration agreements were unconscionable because it deemed them to be effectively non-mutual, as in *Scott*. See *id.* at 10a-11a (citing *Scott*, 161 P.3d at 1008).

The Ninth Circuit also held that the Federal Arbitration Act does not preempt Washington law deeming unenforceable the petitioner's terms and conditions requiring individual arbitration. Pet. App. 11a-18a. The court determined that the Washington Supreme Court's unconscionability law announced in *Scott* was "almost identical" to that created by the California Supreme Court in *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005), which the Ninth Circuit already had held not to be preempted. Pet. App. 16a (adopting reasoning of *Shroyer* v. *New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th

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[3] The court also found that the arbitration provisions' bars on punitive damages and attorney's fees were substantively unconscionable. Pet. App. 32a-34a.

Cir. 2007)). The court below explicitly acknowledged the Third Circuit's conflicting ruling in *Gay* v. *CreditInform*, but "decline[d] T-Mobile's invitation to follow the Third Circuit[]." *Id.* at 17a n.3.

REASONS FOR GRANTING THE PETITION

This case implicates a conflict among the lower federal courts on the question whether the Federal Arbitration Act requires enforcement of agreements to arbitrate consumer disputes on an individual basis, or whether such agreements can be invalidated based on state-law policy in favor of class actions.

The issue presented in this case is the same as the one squarely presented in a prior petition filed by petitioner T-Mobile that is pending before this Court. *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008). The *Laster* case involved a single version of the T-Mobile arbitration agreement and the class claims addressed a single discrete type of transaction implicating only the relationship between T-Mobile and its customers with respect to the sales tax associated with the purchase of a free wireless phone. See Pet'n for Writ of Certiorari at 6-11, *Laster*, No. 07-976. As explained in the *Laster* petition, that case presents an ideal vehicle to address and resolve the same conflict presented in this case. Although the issue presented in this case is equally worthy of review, no reason exists to consider more than one petition raising that same question.

To promote efficiency, petitioner requests that the Court grant review in *Laster* and hold the petition in this case pending the disposition in *Laster*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending the Court's disposition of *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), and then disposed of accordingly.

Respectfully submitted,

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April 18, 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 06-35395

KATHLEEN LOWDEN and JOHN MAHOWALD, individually and on behalf of all the members of the class of persons similarly situated,
Plaintiffs-Appellees,

v.

T-MOBILE USA, INC., a foreign corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Washington; Marsha J. Pechman, *District Judge*, Presiding

Argued and Submitted Nov. 7, 2007
Filed Jan. 22, 2008

Before: WILLIAM C. CANBY, JR., SUSAN P. GRABER, and RONALD M. GOULD, *Circuit Judges*.

GOULD, *Circuit Judge*:

I

The issues on appeal are whether the arbitration provisions in Defendant T-Mobile's service agreements with two of its customers are enforceable under Washington state law and, if not, whether the state law is preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. After two consumers of T-Mobile's cellular phone service brought a class

action against T-Mobile in state court for breach of contract and violation of the Washington Consumer Protection Act (the "CPA"), Wash. Rev.Code § 19.86.010-19.86.920, T-Mobile removed the case to federal district court and moved to compel arbitration per its service agreements. The district court denied T-Mobile's motion to compel arbitration, holding that the arbitration agreements were tainted by substantive unconscionability and thus were unenforceable. We conclude that the Washington State Supreme Court's decision in *Scott v. Cingular Wireless*, 160 Wash.2d 843, 161 P.3d 1000 (2007), establishes that T-Mobile's arbitration provision is substantively unconscionable and unenforceable under Washington state law, and that there is no federal preemption in light of our decision in *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir.2007). We therefore affirm.

II

The two named Plaintiffs, Kathleen Lowden and John Mahowald, are or were T-Mobile customers whose service agreements contained mandatory arbitration provisions with slightly varying terms. Plaintiffs sued T-Mobile, alleging that the service provider had improperly charged them for certain fees beyond the advertised price of service, charged them for calls during a billing period other than that in which the calls were made, and charged them for roaming and other services that should have been free. T-Mobile moved to compel arbitration in accord with the arbitration provisions in Lowden's and Mahowald's service agreements.

In Lowden's service agreement,[1] immediately above the signature line, the following provision appeared: "Disputes are subject to mandatory arbitration pursuant to paragraph 19. See Reverse." Paragraph 19 stated:

> *Mandatory Arbitration*. Any controversy, claim or dispute between you and Company arising under this Agreement, excluding actions by Company to collect unpaid charges, shall be submitted to final, binding arbitration under the auspices of the American Arbitration Association ("AAA") pursuant to its published Wireless Industry Arbitration Rules, incorporated herein by this reference and available by calling the AAA at 800-778-7879 or visiting its web site at http://www.adr.org. Notice of an arbitration commenced by you shall be served on Company's registered agent. All claims shall be arbitrated individually and you agree that no person shall bring a punitive [sic] or certified class action to arbitration or seek to consolidate or bring previously consolidated claims

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[1] We must assure ourselves that the constitutional standing requirements are satisfied before proceeding to the merits. *United States v. Hays*, 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995); *Casey v. Lewis*, 4 F.3d 1516, 1524 (9th Cir.1993). Although the district court and T-Mobile suggest that Lowden may not have standing to pursue her claims, we need not reach this issue. In a class action, standing is satisfied if at least one named plaintiff meets the requirements. *See Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir.2001). Here, the parties do not dispute that Mahowald has standing from his alleged injury in fact that is both traceable to T-Mobile's alleged conduct and likely to be redressed by the damages that Mahowald seeks. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (discussing Article III standing requirements).

> in arbitration. The arbitrator shall have no authority to award punitive damages. YOU ACKNOWLEDGE THAT THIS ARBITRATION PROVISION CONSTITUTES A WAIVER OF ANY RIGHT TO A JURY TRIAL.

Those provisions were also in the Terms & Conditions that accompanied the phone delivered to Lowden and that stated that, "By activating Service with Company, you acknowledge that you have read and agree to the terms of this Agreement." T-Mobile asserts that, had Lowden or her then-husband disagreed with those terms, they could have canceled service and thereby avoided arbitration.

The service agreement in effect when Mahowald signed up with T-Mobile was slightly different in substance. While containing an almost identical provision above the signature line, the provision on the reverse stated:

> *Mandatory Arbitration; Dispute Resolution.* ANY CLAIM OR DISPUTE BETWEEN YOU AND US ARISING UNDER OR IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, AND/OR OUR PROVISION TO YOU OF GOODS, SERVICE, OR UNITS, SHALL BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") PURSUANT TO ITS PUBLISHED WIRELESS INDUSTRY ASSOCIATION RULES, INCORPORATED HEREIN BY THIS REFERENCE AND AVAILABLE BY CALLING THE AAA AT 800-778-7879 OR VISITING ITS WEBSITE AT http://www.adr.org. Any arbitration proceeding shall be subject to the choice of law provision in Paragraph 22. Notice of an arbitration commenced by you must

be served on our registered agent. No party may act as a representative of other claimants or potential claimants in any dispute, and two or more individuals' disputes may not be consolidated or otherwise determined in one proceeding.

An arbitrator may not award relief in excess of or inconsistent with the provisions of the Agreement, order consolidation or arbitration on a class wide basis, or award lost profits, punitive, incidental, or consequential damages or any other damages other than the prevailing party's direct damages, except that the arbitrator may order injunctive or declaratory relief pursuant to applicable law. All administrative expenses of an arbitration will be equally divided between you and Us, except that if the claim is less that $1,000, you will be obligated to pay only $25. If the claim is less than $25, We will pay all administrative expenses. Each party agrees to pay the fees and costs of its own counsel, experts, and witnesses at arbitration. Subject to the foregoing limitations on consolidated or classwide proceedings, you agree, however, that if you fail to timely pay amounts due, We may assign your account for collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement.

YOU ACKNOWLEDGE AND AGREE THAT THIS ARBITRATION PROVISION CONSTITUTES A WAIVER OF ANY RIGHT TO LOST PROFITS, PUNITIVE, SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL OR TREBLE DAMAGES ("DISCLAIMED DAMAGES"), A

JURY TRIAL, OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A *CLASS ACTION. IF FOR ANY REASON THIS* ARBITRATION CLAUSE IS DEEMED INAPPLICABLE OR INVALID, YOU AND WE BOTH WAIVE ANY CLAIMS TO RECOVER DISCLAIMED DAMAGES AND ANY RIGHT TO PURSUE, OR PARTICIPATE AS A PLAINTIFF OR A CLASS MEMBER IN, CLAIMS ON A CLASSWIDE, CONSOLIDATED, OR REPRESENTATIVE BASIS.

As in Lowden's case, the Terms & Conditions accompanying the phones delivered to Mahowald contained the same arbitration provision, along with a similar warning that service activation constituted an agreement to be bound thereby.

Relying on those arbitration provisions, T-Mobile brought its motion to compel individual arbitration. The district court denied the motion, holding that T-Mobile's arbitration provisions were tainted by substantive unconscionability and were therefore unenforceable.

The district court first determined that each named Plaintiff had an agreement. Then, after dismissing Plaintiffs' argument that the agreements as a whole were procedurally unconscionable, the court assessed the agreements for substantive unconscionability. The court preliminarily noted that the Washington State Supreme Court was considering *Scott*, 160 Wash.2d 843, 161 P.3d 1000, which, the court stated, "places squarely at issue the question of whether class action prohibitions contained in arbitration agreements are unconscionable under Washington law and therefore unenforceable." However, at the urging of the parties to decide the issue nonetheless,

the district court declined to stay its ruling pending *Scott*. The district court next turned to the unconscionability of each contested provision within the two arbitration agreements.

The district court held that the prohibition on class relief and the limitation on punitive damages, found in both agreements, were each substantively unconscionable. The district court also concluded that Mahowald's attorney fees provision was substantively unconscionable. Although the court rejected the arguments that the remaining provisions were invalid, it nonetheless declared both arbitration agreements to be unenforceable, despite the severability provisions, because they were "tainted with substantive unconscionability." The district court denied T-Mobile's motion to compel arbitration and entered a stay so that T-Mobile could bring the present interlocutory appeal. We have jurisdiction of this appeal pursuant to 9 U.S.C. § 16(a)(1)(A) and (B).

III

We review *de novo* the denial of a motion to compel arbitration. *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936 (9th Cir.2001). We also review *de novo* the district court's interpretation of the validity and scope of the arbitration clause. *Id.* We review for clear error the district court's findings of fact. *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 888 (9th Cir.2001).

IV

T-Mobile urges us to compel Plaintiffs to arbitrate in accord with the terms of the agreement. T-Mobile argues that the service agreements' terms and the Federal Arbitration Act mandate this result. Congress enacted the FAA more than eighty years ago to

advance the federal policy favoring arbitration agreements. Section 2 states that arbitration agreements made as part of contracts "evidencing a transaction involving [interstate] commerce . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. § 2 (emphasis added). Where, as here, a party attempts to litigate claims covered by a commercial contract containing an arbitration agreement subject to the FAA, the court must determine "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). We apply state-law principles that govern the formation of contracts to determine whether a valid arbitration agreement exists. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

A

We first address whether, under Washington state contract law, a valid agreement to arbitrate exists. This requires us to consider what is unconscionable and unenforceable under Washington state law. After the district court denied T-Mobile's motion to compel arbitration, the Washington State Supreme Court decided *Scott v. Cingular Wireless*, 160 Wash.2d 843, 161 P.3d 1000. In that case, the Washington State Supreme Court considered the enforceability of an arbitration provision within a service agreement binding Cingular Wireless customers, and held that the agreement was unconscionable and unenforceable under Washington law. *Id.* at 1002-03. As in T-Mobile's case, Cingular's arbitration provision con-

tained a clause barring class action litigation or arbitration.[2] *Id.* at 1003.

The Washington State Supreme Court initially noted that the plaintiffs had submitted a declaration from the former division chief for consumer protection in the Washington State Attorney General's office, declaring that that office "did not have sufficient resources to respond to many individual cases and often 'relied on . . . private class action to correct the deceptive or unfair industry practice and to reimburse consumers for their losses.' " *Id.* at 1004. The court also acknowledged the clear split of authority on the enforceability of class action waivers in arbitration clauses. *Id.*

Turning to the class action waiver's enforceability, the court first observed that "[a]n agreement that violates public policy may be void and unenforceable." *Id.* at 1005 (citing Restatement (Second) of Contracts § 178 (1981)). The court then discussed Washington's "state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice." *Id.* It noted that "when consumer claims are small but numerous, a class-based remedy is the only effective method to vindicate the public's rights." *Id.*

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[2] The remaining Cingular provisions differed slightly from T-Mobile's provisions. For instance, Cingular's agreement provided that Cingular would "pay the filing, administrator, and arbitration fees unless the customer's claim was found to be frivolous; that Cingular would reimburse the customer for reasonable attorney fees and expenses incurred for the arbitration (provided that the customer recovered at least the demand amount); and that the arbitration would take place in the county of the customer's billing address." *Scott*, 161 P.3d at 1003. The agreement had also initially limited punitive damages, but Cingular subsequently removed that limitation. *Id.*

The court held that Cingular's particular class action waiver was unconscionable. The court discussed the public policies that class actions advance, declaring that, "without class actions, consumers would have far less ability to vindicate the CPA." *Id.* at 1006. It also stated that the class action waiver clause was "an unconscionable violation of [Washington's] policy to protect the public and foster fair and honest competition because it drastically forestall[ed] attempts to vindicate consumer rights" and was, therefore, "substantively unconscionable." *Id.* (internal quotation marks and citation omitted).

The court then noted that the agreement was additionally unconscionable because it "in effect . . . exculpate[d] Cingular from legal liability for any wrong where the cost of pursuit outweighs the potential amount of recovery." *Id.* at 1007. It asserted that the availability of a class action mechanism would "transform [ ] a merely theoretically possible remedy into a real one." *Id.* The court reasoned that merely shifting the cost of arbitration to Cingular did not seem likely to "make it worth the time, energy, and stress to pursue such individually small claims," especially when attorney fees would be awarded only if the plaintiffs recovered at least the full amount of their demand. *Id.*

The court reasoned that, because the clause barred any class action, in or outside arbitration, it functioned to "exculpate the drafter from liability for a broad range of undefined wrongful conduct, including potentially intentional wrongful conduct, and that such exculpation clauses are substantively unconscionable." *Id.* at 1008. The court concluded: "A clause that unilaterally and severely limits the remedies of only one side is substantively unconscionable

under Washington law for denying any meaningful remedy." *Id.*

The Cingular class action waiver provision that *Scott* declares to be unenforceable is indistinguishable in all material respects from T-Mobile's class action waiver. The Washington State Supreme Court's holding in *Scott* requires us to determine that T-Mobile's class action waiver is substantively unconscionable, and unenforceable, under Washington law. T-Mobile's class action waiver, like Cingular's, bars class actions in both litigation and arbitration, and the Washington State Supreme Court's unconscionability analysis in *Scott* applies as forcefully to T-Mobile's agreement.

We need not reach whether T-Mobile's remaining provisions are unconscionable. T-Mobile has expressly stated that it does not consent to class action arbitration and that, as a result, if we deem the class action waiver clause unconscionable under Washington law, the entire arbitration provision should be rendered unenforceable. Having determined that the (nonseverable) class action waiver is invalid under Washington law, we hold that T-Mobile's arbitration agreement is unenforceable under Washington law.

B

We next consider T-Mobile's argument that the Federal Arbitration Act preempts Washington law from thus rendering T-Mobile's class action waiver unconscionable, and thereby rendering unenforceable its arbitration agreement. The FAA provides that contractual arbitration agreements "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (emphasis added).

The United States Supreme Court has interpreted this statute to require that any state legal principle attempting to invalidate an arbitration agreement must be a principle that applies to contracts generally. In *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996), for example, the Supreme Court stated:

> "[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.' "

Id. at 687, 116 S.Ct. 1652 (citations omitted). *See also Southland Corp. v. Keating*, 465 U.S. 1, 16 n. 11, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984).

T-Mobile argues that the FAA preempts Washington's determination that its class action waiver is unconscionable. T-Mobile asserts that the Washington State Supreme Court's holding in *Scott* that Cingular's class action waiver is unconscionable is not a contractual rule of general applicability under the FAA.

We recently decided *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976. In *Shroyer*, we considered the enforceability of another Cingular arbitration agreement containing a class action waiver. We determined not only that the agreement was unconscionable under California law, but also that

the FAA did not preempt California law on this issue. *Id.* at 987. We first surveyed California law on unconscionability, and in particular the test the California Supreme Court set forth in *Discover Bank v. Superior Court of Los Angeles*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), requiring a finding of both procedural and substantive unconscionability to render a provision invalid. *Shroyer*, 498 F.3d at 981-82 (citing *Discover Bank*, 30 Cal. Rptr.3d 76, 113 P.3d at 1108). We quoted *Discover Bank*'s reasoning:

> "We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced."

Id. at 983, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (alteration in *Shroyer*) (quoting *Discover Bank*, 30 Cal. Rptr.3d 76, 113 P.3d at 1100).

Applying *Discover Bank*'s test, we concluded that Cingular's class action waiver was unconscionable under California law because the agreement was of the type that *Discover Bank* foreclosed—a contract of adhesion in a setting involving disputes between

contracting parties that predictably concerned only small amounts of damages and where, according to the *Shroyer* plaintiffs, the party with the superior bargaining power (i.e., the wireless provider) had carried out a fraudulent scheme deliberately to cheat large numbers of consumers out of individually small sums of money. *Id.* at 983-84. We observed that in *Discover Bank* the California Supreme Court had been concerned "that when the potential for individual gain is small, very few plaintiffs, if any, will pursue individual arbitration or litigation, which greatly reduces the aggregate liability a company faces when it has exacted small sums from millions of consumers." *Id.* at 986, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (emphasis omitted). As in T-Mobile's present case, the invalidating of Cingular's class action waiver rendered the entire arbitration agreement unenforceable. *Id.* at 986-87, 30 Cal.Rptr.3d 76, 113 P.3d 1100.

Having decided that the agreement was unenforceable under California law, we next considered Cingular's argument that the FAA preempted California law. Cingular had argued that *Discover Bank*'s unconscionability provisions subjected arbitration agreements to special scrutiny. *Id.* at 987, 30 Cal. Rptr.3d 76, 113 P.3d 1100. The United States Supreme Court had previously observed that "'[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with th[e] requirement of § 2' and is preempted." *Id.* (first alteration in original) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987)). We held, however, that such a principle was not at issue in *Shroyer*; rather, the California principle of unconscionability was a generally applicable contract defense, which could

be applied to invalidate an arbitration agreement without contravening the FAA. *Id.* at 987-88. We further commented that we had previously rejected Cingular's argument that California's unconscionability doctrine was preempted by the FAA and that *Discover Bank*'s statement that the doctrine applied to contracts generally, not only to arbitration agreements, affirmed that California law on this point did not contravene the FAA. *Id.* at 988.

We rejected Cingular's argument that application of California's unconscionability principles would obstruct Congress's purposes in enacting the FAA. Congress's primary purpose behind the FAA requires that we enforce the terms of arbitration agreements like other contracts, not more so. *Id.* at 989. We reasoned: "To hold that California unconscionability law may be applied only to invalidate a class action waiver, but not a class arbitration waiver, would place arbitration agreements on a different footing than other contracts, in direct contravention of th[e] principal purpose of the [FAA]." *Id.* at 990 (citing *Scott*, 161 P.3d at 1008 ("Congress simply requires us to put arbitration clauses on the same footing as other contracts, not make them the special favorites of the law.")).

We also rejected Cingular's suggestions that the FAA implicitly exalted individual arbitration but disfavored class arbitration, *id.* at 990, 161 P.3d 1000, and that class arbitration would reduce arbitration's alleged general efficiency, *id.* at 990-92, 161 P.3d 1000. We concluded that the FAA did not preempt California unconscionability principles from invalidating Cingular's class action waiver and therefore its arbitration agreement. *Id.* at 993, 161 P.3d 1000.

The invalid class action waiver in *Shroyer* is, in all material respects, identical to T-Mobile's waiver. As in *Shroyer*, T-Mobile's class action waiver lies within a contract of adhesion governing claims likely to concern only small sums of money that the defendant is alleged to have fraudulently obtained from the plaintiffs. Most significantly, the Washington State Supreme Court grounded its unconscionability determination in *Scott* in concerns almost identical to those underpinning California's unconscionability determination in *Discover Bank*. Thus *Shroyer*'s conclusion with respect to California unconscionability law applies equally here: Just as the FAA does not preempt California's unconscionability law, it does not preempt Washington's unconscionability law. As we explained in *Shroyer*, the California Supreme Court sought in *Discover Bank* to remedy its concern that, when the potential for individual gain is small, few if any plaintiffs will pursue either individual arbitration *or* litigation, thereby greatly reducing the aggregate liability a company faces when it has exacted small sums from millions. Those are the same concerns that underlie the Washington State Supreme Court's holding in *Scott*.

We reject T-Mobile's argument that *Scott*'s unconscionability principles do not apply in all contracts—in other words, that they treat arbitration agreements differently than other contracts. In *Shroyer*, we rejected Cingular's analogous argument, notwithstanding the California Supreme Court's recognition in *Discover Bank* that it was not holding that all class action waivers are necessarily unconscionable, but rather only those in certain circumstances. As *Shroyer*'s holding suggests, *Scott*'s unconscionability principles embody grounds to revoke any contract,

not just arbitration agreements. The *Scott* principles apply equally to a contract that permits only individual, not aggregate, litigation in court. Stated another way, the *Scott* holding targets not the arbitration context, but rather the class action waiver, which the Washington State Supreme Court has determined would deprive Washington consumers of a right generally applicable to arbitration and litigation contracts alike and which only happens to be within an arbitration agreement in this case.[3]

Finally, T-Mobile's claim, in essence, that the FAA requires a state to enforce a class action waiver merely because it lies within an arbitration agreement—whereas a state would be free to find the same waiver to be invalid in the litigation context—contravenes the FAA's mandate of an "equal footing" between arbitration and other forms of dispute resolution. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) ("Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts. . . ."). The FAA proscribes states from giving arbitration special treatment, whether it be positive or negative.

AFFIRMED.

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[3] We also decline T-Mobile's invitation to follow the Third Circuit's holding in *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007). Unlike the Third Circuit's conclusion as to the applicable state law in *Gay*, we determine that the Washington Supreme Court in *Scott* does not hold "that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate." *Id.* at 395.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. WASHINGTON

No. C05-1482P

KATHLEEN LOWDEN, *et al.*,
Plaintiffs,

v.

T-MOBILE, USA, INC.,
Defendant.

April 13, 2006

ORDER ON DEFENDANT'S MOTION TO DISMISS OR STAY AND TO COMPEL ARBITRATION

PECHMAN, *J.*

Introduction

This matter comes before the Court on Defendant T-Mobile's Motion to Dismiss or Stay and to Compel Arbitration. (Dkt. No. 10). Having reviewed all the pleadings and supplementary materials, and having heard oral argument, the Court finds that the arbitration provisions in Defendant's wireless telephone service agreements contain terms that are substantively unconscionable under Washington law. Furthermore, under these circumstances, the unconscionable provisions at issue permeate the purpose and effect of the arbitration agreements such that severance of the offending provisions is inappropriate, and neither arbitration agreement can be enforced. Accordingly, Defendant's motion is DENIED.

Background

The named plaintiffs in this putative class action are Kathleen Lowden and John Mahowald. (Compl. at 4-5, ¶ 2.1). Ms. Lowden, Mr. Mahowald, and the other putative class members are or were customers of Defendant's wireless telephone services, and they seek to maintain a nationwide class action. (*Id.* at 12-13, ¶¶ 4.1-4.6). Defendant T-Mobile USA, Inc., is a national telecommunications corporation that is incorporated in Delaware and has its principal place of business in Bellevue, Washington. (*Id.* at 5, ¶ 3.2). Formerly, the company was known as Voicestream Wireless. (Def's. Opening Br. at 1-2).

Plaintiff Lowden is apparently the ex-wife of John Miller, the person with whom Defendant contracted to provide the wireless phone service that Lowden uses. (*Id.* at 5). Miller first purchased a phone and signed a service agreement in 2000. (*Id.*). The service agreement included an arbitration provision that states in relevant part:

> Any controversy, claim or dispute between you and Company arising under this Agreement, excluding actions by Company to collect unpaid charges, shall be submitted to final, binding arbitration under the auspices of the American Arbitration Association ("AAA") pursuant to its published Wireless Industry Arbitration Rules, incorporated herein by this reference . . . [a]ll claims shall be arbitrated individually and you agree that no person shall bring a punitive [sic] or certified class action to arbitration or seek to consolidate or bring previously consolidated claims in arbitration. The arbitrator shall have no authority to award punitive damages . . . YOU ACKNOWLEDGE THAT THIS ARBITRATION

PROVISION CONSTITUTES A WAIVER OF ANY RIGHT TO A JURY TRIAL.

(Def's. Opening Br., Decl. of Derek Chang at ¶ 17; Ex. 3, at 3, ¶ 19).

Plaintiff Mahowald first purchased a phone and contracted for wireless phone service with Defendant in 2002. (*Id.* at 2-3). Defendant does not have a copy of any signed service agreement with Mahowald, but its Marketing Director declares that he would have been required to sign one. (*Id.*, Decl. of Derek Chang at ¶¶ 5-11). The agreement he would have signed provides:

> ANY CLAIM OR DISPUTE BETWEEN YOU AND US ARISING UNDER OR IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, AND/OR OUR PROVISION TO YOU OF GOODS, SERVICE, OR UNITS SHALL BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION . . . [n]o party may act as a representative of other claimants or potential claimants in any dispute, and two or more individuals' disputes may not be consolidated or otherwise determined in one proceeding. An arbitrator may not award relief in excess or inconsistent with the provisions of the Agreement, order consolidation or arbitration on a classwide basis, or award lost profits, punitive, incidental, or consequential damages or any other damages other than the prevailing party's direct damages, except that the arbitrator may order injunctive or declaratory relief pursuant to applicable law. All administrative expenses of an arbitration will be equally divided between you and Us, except if the claim is less than $1000,

you will be obligated to pay only $25. If the claim is less than $25, We will pay all administrative expenses. Each party agrees to pay the fees and costs of its own counsel, experts, and witness at the arbitration. Subject to the foregoing limitations on consolidated or classwide proceedings, you agree, however, that if you fail to timely pay amounts due, We may assign your account for collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement.

YOU ACKNOWLEDGE AND AGREE THAT THIS ARBITRATION PROVISION CONSTITUTES A WAIVER OF ANY RIGHT TO LOST PROFITS, PUNITIVE, SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, OR TREBLE DAMAGES ("DISCLAIMED DAMAGES"), A JURY TRIAL OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A CLASS ACTION. IF FOR ANY REASON THIS ARBITRATION CLAUSE IS DEEMED INAPPLICABLE OR INVALID, YOU AND WE BOTH WAIVE ANY CLAIMS TO RECOVER DISCLAIMED DAMAGES AND ANY RIGHT TO PURSUE, OR PARTICIPATE AS A PLAINTIFF OR AS A CLASS MEMBER IN, CLAIMS ON A CLASSWIDE, CONSOLIDATED, OR REPRESENTATIVE BASIS.

(*Id.*, Decl. of Derek Chang at ¶ 6; Ex. 1, at 3, ¶ 3).

Defendant's Marketing Director also declares that Mr. Mahowald would have received a superseding "Terms and Conditions" agreement as part of the "Welcome Guide" that Defendant regularly ships

with new phones and upgrades. (*See id.* at 2-4, n. 1). The "Terms and Conditions" agreement contains an arbitration agreement with several terms that differ from those in the service agreement. However, as will be discussed, Defendant has not established the enforceability of that agreement, so those terms are not discussed.

Mr. Mahowald does not explicitly deny that he signed a service agreement, but instead contends that Defendant has not proven he signed or received any agreements. (Pls.' Opp'n at 1). He asserts that he has no contract with Defendant except for an oral contract memorialized in T-Mobile's customer care records. (*Id.*, Decl. of Alex Rose at ¶ 3, 18).

Plaintiffs filed their complaint in this case on July 27, 2005, alleging breach of contract and violation of the Washington Consumer Protection Act (CPA) based on Defendant's billing practices. (*See* Compl. at 10-15). Specifically, Plaintiffs allege that Defendant imposed a "USF-RCR," or "Universal Service Fee-Regulatory Cost Fee" in a deceptive manner, leading customers to believe it was a government-mandated tax; imposed charges on customers for exceeding their allotted monthly minutes, but imposed those charges in months in which the calls were not made; and imposed roaming, long-distance, and other fees for services when those services were supposed to be free of charge. (*See* Compl. at 7-10, ¶¶ 1.1-1.16). Defendant now brings this Motion to Dismiss or Stay and to Compel Arbitration.

Analysis

The Federal Arbitration Act ("FAA") provides that an arbitration provision in a contract "evidencing a transaction involving commerce . . . is valid, irre-

vocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This section of the FAA is "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Thus, district courts must compel arbitration where a valid agreement to arbitrate exists. *See Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9th Cir.2000). The party resisting arbitration has the burden of proving that the arbitration agreement is unenforceable. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91-92, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).

Whether the arbitration agreements in this case are valid is controlled by state law. *See, e.g., Perry v. Thomas*, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) ("state law, whether of judicial or legislative origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.") (emphasis in original); *see also Ticknor v. Choice Hotels, Intern., Inc.*, 265 F.3d 931, 936-37 (9th Cir.2001).

A. *Lack of Agreement*

Plaintiff Lowden clearly has an agreement; it is the one under which she now sues, and which her husband voluntarily signed in order to obtain T-Mobile services.[1] Therefore, she is bound by the provisions of

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[1] As Defendant notes in its Opening Brief, there may be an issue of standing with respect to Plaintiff Lowden's claims. (Def's. Opening Br. at 11-12). However, under the FAA, the district court's role is limited; this Court can determine "only

that agreement to the extent that the agreement is enforceable. *See Skagit State Bank v. Rasmussen*, 109 Wash.2d 377, 381, 745 P.2d 37 (1987).

Plaintiff Mahowald is a different story. While not actually denying that he signed a service agreement, Plaintiffs argue that Defendant has "presented no competent or admissible evidence based upon personal knowledge" that Mr. Mahowald was contractually bound by any signed form or mailed "Welcome Guide." (Pls.' Opp'n at 1). Further, Plaintiffs argue that the only contract Mr. Mahowald could have is a verbal one, noted in Defendant T-Mobile's customer care records. (*Id.*).

The FAA requires a district court to issue an order compelling arbitration "upon being satisfied that the making of the agreement for arbitration . . . is not in issue," though "if the making of the agreement is in issue . . . the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4. However,

> to put such matters in issue, it is not sufficient for the party opposing arbitration to utter general denials of the facts on which the right to arbitration depends. If the party seeking arbitration has substantiated the entitlement by a showing of evidentiary facts, the party opposing may not rest on a denial but must submit

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whether a written arbitration agreement exists, and if it does, enforce it according to its terms." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720 (9th Cir.1999). Accordingly, to the extent that Ms. Lowden seeks to sue under a contract with Defendant that contains a written arbitration agreement, she is bound by the enforceable terms of that agreement.

> evidentiary facts showing that there is a dispute of fact to be tried.

Oppenheimer & Co., Inc. v. Neidhardt, 56 F.3d 352, 358 (2d Cir.1995).

Under Washington law, Defendant's evidence that signed service agreements are required before it will provide wireless phone service is business custom evidence that is "admissible and relevant to prove or disprove the existence of a contract." *Industrial Electric-Seattle, Inc. v. Bosko*, 67 Wash.2d 783, 797, 410 P.2d 10 (1966). Defendant has thus substantiated its claim that the parties entered into the arbitration agreement contained in the service agreement. However, Mr. Mahowald has failed to place the making of that arbitration agreement in issue because he does not explicitly deny that he signed the service agreement. Therefore, the Court concludes that he is bound by the provisions of that arbitration agreement to the extent that the agreement is enforceable.

However, Defendant has not substantiated its entitlement to arbitration based on the "Welcome Guide" or anything else it mails to customers. Proof of mailing must be made by a showing of "(1) an office custom with respect to mailing, and (2) compliance with the custom in the specific instance." *Matsko v. Dally*, 49 Wash.2d 370, 376-77, 301 P.2d 1074 (1956). Here, the declaration of Defendant's Marketing Director is evidence of Defendant's custom, but there is no similar declaration or other evidence of compliance with that custom when Plaintiff Mahowald's "Welcome Guide" was supposedly mailed. *See, e.g., id.* at 377, 301 P.2d 1074 (no proof of compliance without testimony of clerk or other person who customarily mailed from the office); *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 57 Wash.App. 886,

890, 790 P.2d 1254 (1990) (insufficient proof of custom and compliance).

To summarize, Plaintiff Lowden is bound by the provisions of the arbitration agreement contained in the "Terms and Conditions" agreement that her ex-husband signed in 2000,[2] to the extent that agreement is enforceable. Plaintiff Mahowald is bound the provisions of the arbitration agreement contained in the "Terms and Conditions" agreement he would have been required to sign in 2002 as a condition of his service, to the extent that agreement is enforceable.

B. *Procedural Unconscionability*

Plaintiffs argue next that their arbitration agreements are unenforceable because they are procedurally unconscionable. (Pls.' Opp'n at 7-8). Procedural unconscionability is "the lack of meaningful choice, considering all the circumstances surrounding the transaction, including (1) the manner in which the contract was entered, (2) whether each party had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms were hidden in a maze of fine print." *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 345, 103 P.3d 773 (2004) (internal citations omitted). These three factors are not to be applied "mechanically" without

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[2] Defendant asserted that Lowden would also have received a "Terms and Conditions" agreement with her phone when it was delivered, (Def's. Opening Br., Decl. of Derek Chang at 2, ¶¶ 4-5, Ex. 4), but Plaintiffs' counsel later produced the original signed service agreement, (*see* Def's. Reply at 3, Decl. of Bradley Fischer, at ¶ 5, Ex. 3), and it is identical to the one that would have been mailed. Therefore, Defendant's custom with respect to mailing is irrelevant as to her agreement.

regard to whether a meaningful choice actually existed. *Id.*

Plaintiffs rely on the fact that these agreements are contracts of adhesion. (Pls.' Opp'n at 7-8). Plaintiffs are correct that the agreements are adhesive because they are (1) standard form printed contracts, (2) prepared by T-Mobile and submitted to prospective customers on a take-it-or-leave-it basis, and (3) there is no true equality of bargaining power between T-Mobile and its customers. *See Adler*, 153 Wash.2d at 347-48, 103 P.3d 773. However, contracts of adhesion are not necessarily unconscionable. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wash.2d 293, 304, 103 P.3d 753 (2004). Indeed, despite the adhesive nature of these agreements, Plaintiffs did not experience the requisite "lack of meaningful choice."

First, there is no evidence to suggest that the manner in which they entered into their contracts was oppressive, deceptive, or even hurried. *Compare Zuver*, 153 Wash.2d at 306, 103 P.3d 753 (holding that agreement was not procedurally unconscionable because plaintiff had 15 days to consider the contract, and opportunity to contact counsel or defendant with questions), *with Adler*, 153 Wash.2d at 348, 103 P.3d 773 (remanding for determination of procedural unconscionability because factual dispute existed as to whether employer threatened discharge if plaintiff did not sign the agreement).

Second, there is no evidence to suggest that Plaintiffs did not have a reasonable opportunity to understand the terms of the agreements. The fact that they had as much as time as they wanted to consider the agreements before signing them is conclusive on this point. *See Zuver*, 153 Wash.2d at 306, 103 P.3d 753 (reasonable opportunity where the

defendant did not demand immediate return of the agreement and plaintiff had 15 days to consider it) *citing Luna v. Household Fin. Corp. III*, 236 F.Supp.2d. 1166, 1176 (W.D.Wash.2002) (three day rescission period under the Truth in Lending Act was sufficient to provide reasonable opportunity to consider the terms of an agreement).

Finally, although the typeface is relatively small, these arbitration provisions are not hidden in a "maze of fine print." The provisions in both Plaintiffs' agreements are clearly labeled "Mandatory Arbitration," and just above the signature line in both service agreements, there is specific reference to the numbered paragraph in the attached "Terms and Conditions" that contains the arbitration provisions. These features militate against a finding of procedural unconscionability. *See Adler*, 153 Wash.2d at 349-50, 103 P.3d 773 (no "maze of fine print" where the first sentence of the arbitration clause explicitly stated that any disputes would be arbitrated).

C. *Substantive Unconscionability*

Plaintiffs also argue that their arbitration agreements are unenforceable because they are substantively unconscionable. (Pls.' Opp'n at 8-17). Substantive unconscionability "involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh," and is described sometimes with terms such as "'shocking to the conscience,' 'monstrously harsh,' or 'exceedingly calloused.'" *Zuver*, 153 Wash.2d at 303, 103 P.3d 753. Although substantive unconscionability is a question of law, it is "based on the factual circumstances surrounding the transaction." *Tjart v. Smith Barney, Inc.*, 107 Wash.App. 885, 898, 28 P.3d 823 (2001). One such circumstance that should be considered is

the consumer context of the transaction. *See Luna*, 236 F.Supp.2d at 1183 (citing Washington cases). Plaintiffs allege that their agreements are substantively unconscionable on several grounds.

1. Prohibition of Class Relief

Defendant is correct that some Washington courts have enforced arbitration provisions that effectively prevent class relief. *See Heaphy v. State Farm Mut. Auto. Ins. Co.*, 117 Wash.App. 438, 447, 72 P.3d 220 (2003), *citing Stein v. Geonerco, Inc.*, 105 Wash.App. 41, 49, 17 P.3d 1266 (2001). Washington courts have also upheld arbitration provisions even though they required arbitration of CPA claims. *See Stein*, 105 Wash.App. at 49 n. 1, 17 P.3d 1266, *citing Garmo v. Dean, Witter, Reynolds, Inc.*, 101 Wash.2d 585, 590, 681 P.2d 253 (1984). However, neither *Heaphy* nor *Stein* addressed the unconscionability of class action prohibitions, but instead rested their holdings on the plaintiffs' failures to "demonstrate a conflict with statutory provisions, contract law, or due process requirements."[3] *See Heaphy*, 117 Wash.App. at 447, 72 P.3d 220; *Stein*, 105 Wash.App. at 50, 17 P.3d 1266.

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[3] At oral argument, Defendant's counsel advised the Court that the Washington Supreme Court was hearing oral argument that same day in the matter of *Scott v. Cingular Wireless*, No. 77406-4. The *Scott* case places squarely at issue the question of whether class action prohibitions contained in arbitration agreements are unconscionable under Washington law and therefore unenforceable. This Court directed the parties to show cause why the ruling in the instant case should not be deferred, given the likelihood that *Scott* will be controlling on the issues here. (Dkt. No. 28). However, both parties responded by urging this Court to rule on the instant motion. Accordingly, the Court now rules on the instant motion, though it is mindful of the fact that Washington law is currently in flux.

Plaintiffs rely on *Luna*, in which Judge Lasnik of this Court held that a prohibition of class actions was unconscionable because it prevented effective vindication of statutory rights. 236 F.Supp.2d. at 1178-79, *citing Darling v. Champion Home Builders Co.*, 96 Wash.2d 701, 706, 638 P.2d 1249 (1982) (discussing the importance of class actions in the consumer protection context) *and Mendez v. Palm Harbor Homes*, 111 Wash.App. 446, 465, 45 P.3d 594 (2002) (explaining the unconscionability of preventing citizens from access to the courts to vindicate their rights). The *Luna* Court also held that the class action prohibition was one-sided because there was "no reasonable possibility" that the corporate defendant would ever institute a class action against its individual customers. *Id.* at 1179.

The Court is persuaded by the reasoning in *Luna* on each of these scores. First, the class action prohibitions deprive Plaintiffs of the means to effectively vindicate their rights under the CPA. This is so because, given the nature of the claims involved in this case, the prohibition "is likely to bar actions involving practices applicable to all potential class members, but for which an individual consumer has so little at stake that she is unlikely to pursue her claim." *Luna*, 236 F.Supp.2d at 1179. Thus, the class action prohibitions in these arbitration agreements have been used as "a sword to strike down access to justice instead of as a shield against prohibitive costs." *Id., quoting Mendez*, 111 Wash.App. at 465, 45 P.3d 594. Second, although the class action limitations in these arbitration provisions are nominally mutual, they are effectively one-sided because there is no conceivable set of facts under which T-Mobile would bring a class action against its customers. For these reasons, the prohibitions on class actions con-

tained in Plaintiffs' arbitration agreements are substantively unconscionable.

2. Limitation of Remedies

A limitation of remedies may also be nominally mutual, yet have the impermissible *effect* of being so one-sided and harsh that it is substantively unconscionable. *See Zuver*, 153 Wash.2d at 318, 103 P.3d 753. In *Luna*, Judge Lasnik of this Court found that a remedies limitation was overly one-sided because it prohibited any resort to judicial remedies, except that either the defendant (a lending company) or the plaintiffs (the borrowers) could bring a lawsuit to protect or foreclose on property involved in a loan. 236 F.Supp.2d at 1180. Because the limitation allowed a judicial forum in the only type of suit the defendant would ever bring, while borrowers could only go to court in one of the many types of suits they might bring, the Court found the limitation so one-sided that it was unconscionable. *Id.*

In this case, the remedies limitations are not so one-sided that they are substantively unconscionable. For the most part, the agreements require both sides to arbitrate disputes. However, Plaintiff Lowden's arbitration agreement excludes "actions by the Company to collect unpaid charges," while Plaintiff's Mahowald's agreement states that Defendant may assign customer accounts for collection and that the collection agency may pursue claims in court "limited strictly to the collection of the past due debt" and any permissible interest or cost of collection. These limited exclusions are not overly harsh or shocking to the conscience. Collection actions are standard and fairly routine business practices. In Mr. Mahowald's case, T-Mobile is only permitted to assign an account to a collection agency, and a collection agency's later

decision to bring suit is not certain. In addition, these arbitration provisions presumably do not bar a customer from causing a suit to be brought against Defendant, for example by forwarding information to the Attorney General so that she or he may decide whether or not to bring a CPA claim on behalf of the citizens of Washington. *See* RCW 19.86.080-095.

3. Limitation on Damages

Plaintiffs argue next that the damages limitations in each of their arbitration agreements are substantively unconscionable. (Pls.' Opp'n at 13-14). Plaintiff Lowden's arbitration agreement provides that the "arbitrator shall have no authority to award punitive damages," (Def's. Opening Br., Decl. of Derek Chang, Ex. 3, at 3, ¶ 19), and Plaintiff Mahowald's agreement purports to be a waiver of punitive, exemplary, and treble damages (*id.*, Ex. 1, at 3, ¶ 3). The Court finds these limitations to be substantively unconscionable for the same reasons that the class action prohibitions are substantively unconscionable.

First, these damages limitations are substantively unconscionable because they are effectively one-sided. Punitive or exemplary damages are not allowed in Washington unless specifically authorized by the legislature. *See Dailey v. North Coast Life Ins. Co.*, 129 Wash.2d 572, 590, 919 P.2d 589 (1996). Indeed, the CPA's treble damages provision is one example of such specific authorization. *See id.* at 592; *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wn.2d 692, 699-700 (1981); *Gould v. Mut. Life Ins. Co. of New York*, 735 F.2d 1165, 1166-67 (9th Cir. 1984). Punitive damages are thus recoverable only pursuant to statutory claims. However, while the damages limitations here are nominally mutual, the

Court cannot imagine a scenario in which Defendant would ever seek punitive damages, under the CPA or otherwise, against its individual customers. Therefore, the limitations are one-sided in effect and substantively unconscionable. *See Zuver*, 153 Wash. 2d at 318-19, 103 P.3d 753 (holding that a damages limitation was substantively unconscionable because it prohibited punitive damage awards for any common law claims brought by an employee, but permitted the employer to recover such damages for the only type of claim it would ever likely bring, a breach of a confidentiality agreement).

Second, these damages limitations are substantively unconscionable because they deprive Plaintiffs of the means to effectively vindicate their rights under the CPA. The punitive damages provision of the CPA has the purposes of enabling injured plaintiffs to pursue their own claims and to reimburse them for enforcing the Act on behalf of the general citizenry. *St. Paul Fire & Marine Ins. Co. v. Updegrave*, 33 Wash.App. 653, 658, 656 P.2d 1130 (1983). If this measure of damages is unavailable, Plaintiffs' ability to initiate suit is dramatically hindered. Therefore, as in the context of the class action prohibition, the limitations on punitive damages under these circumstances "works oppression," *Luna*, 236 F.Supp.2d at 1179, *quoting Mendez*, 111 Wash. App. at 465, 45 P.3d 594, because the limitations strip Plaintiffs of a statutorily authorized means to enforce their rights, as well as the rights of the Washington citizenry at large. For these reasons, the damages limitations in both of Plaintiffs' arbitration agreements are substantively unconscionable to the extent that they preclude the award of punitive or exemplary damages under the CPA.

4. Prohibition of Attorneys' Fees

Plaintiff Lowden's arbitration agreement does not prohibit attorneys' fees, and therefore cannot be substantively unconscionable on this basis. Plaintiff Mahowald's arbitration agreement, however, provides that "each party agrees to pay the fees and costs of its own counsel, experts, and witness at the arbitration." (Def's. Opening Br., Decl. of Derek Chang, Ex. 1, at ¶ 3). The provision also states that "an arbitrator may not award relief in excess or inconsistent with the provisions of this Agreement, . . . except that an arbitrator may award injunctive or declaratory relief." (*Id.*). This makes it clear that customers bringing claims against Defendant may not recover attorneys' fees.

In *Zuver*, the Court held that a clause providing that "parties shall bear their own respective costs and attorneys fees" was substantively unconscionable because it undermined the plaintiff's rights to attorney fees under the Washington Law Against Discrimination. 153 Wash.2d at 355, 103 P.3d 773. Here, there is likewise a clear prohibition of attorneys' fees, as well as a specific entitlement to them under the statute furnishing one of Plaintiffs' causes of action. *See* RCW 19.86.090 (permitting recovery of actual damages, costs of suit, "including reasonable attorneys' fees"). Therefore, the prohibition of attorneys' fees in Plaintiff Mahowald's arbitration agreement is substantively unconscionable.

5. Limitations on Discovery

Plaintiffs argue that their arbitration agreements are substantively unconscionable because the AAA's Wireless Industry Arbitration Rules, which are incorporated into their agreements by reference, do not

allow for the adequate discovery that is necessary to effectively vindicate consumer rights under the CPA. (Pls.' Opp'n at 15-16).

It is true that the "Fast Track" procedures applicable to claims involving less than $2,000 generally prohibit discovery, but it is available "in extraordinary cases when the demands of justice require it." (*Id.*, Decl. of Alex Rose, at 28, ¶ F-9). Moreover, the "Fast Track" procedures cannot be applied without agreement of the parties in cases where there is no disclosed monetary claim, or where equitable relief is sought. (*Id.*, Decl. of Alex Rose, at 20). In the instant case, Plaintiffs have not as yet disclosed the sums sought by Mr. Mahowald or Ms. Lowden (although they estimate classwide damages to be $40 million), and they do in fact pray for injunctive relief. (*See* Compl. at ¶¶ 1.1, 5.10, 6.8, 8.1-8.6). As a result, Plaintiffs may refuse to agree to "Fast Track" procedures, and instead insist on "Regular Track" Rules which provide that the arbitrator "may issue a subpoena for witnesses or documents upon the request of any party or independently." (Pls.' Opp'n, Decl. of Alex Rose, at 24, ¶ R-30). For this reason, the incorporated Wireless Industry Arbitration Rules do not render the arbitration agreements in this case substantively unconscionable.

Moreover, there is inevitable uncertainty as to how an arbitrator might interpret the Rules and conduct an arbitration, and it is not the proper purview of this Court to indulge in such speculation. In *Zuver*, the Court held that an ambiguous attorneys' fees provision was not substantively unconscionable because plaintiff's contention that she would not be entitled to fees was "mere speculation" as to how the

arbitrator would interpret the provision and applicable law. 153 Wash.2d at 311, 103 P.3d 753, *citing PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 406-07, 123 S.Ct. 1531, 155 L.Ed.2d 578 (2003). This reasoning also demonstrates why potential discovery limitations in arbitration cannot invalidate the agreements in this case, because there are many discretionary decisions that the arbitrator would make.

6. Cost-Prohibitiveness of Arbitration

Washington law is clear on this issue: "[w]here a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Adler*, 153 Wash.2d at 353, 103 P.3d 773, *citing Green Tree Fin. Corp.*, 531 U.S. at 92. Carrying the burden requires production of "specific information" about the party's personal finances and the prospective arbitration fees. *Id.* at 354, *citing Mendez v. Palm Harbor Homes Inc.*, 111 Wash.App. 446, 465, 45 P.3d 594 (holding that plaintiff satisfied the burden with a personal affidavit describing his circumstances and fee information obtained from the American Arbitration Association). Limited discovery may be appropriate to determine whether costs are prohibitive, but once they are established, they may be offset by contrary evidence, including an offer by the other party to pay all or a part of the arbitration fees and costs. *Id.*

Here, Plaintiffs allege that arbitration would "probably" cost at least $375 to $550 for each member of the class to arbitrate a claim worth on [sic] a few hundred dollars, (Pls.' Opp'n at 17), yet they provide no documentation or other information to back it up. Moreover, Defendant T-Mobile has stated its

willingness to pay all fees and costs, (Def's. Reply at 11), which offsets any evidence that Plaintiffs could provide, *see Zuver*, 153 Wash.2d at 310, 103 P.3d 753. For these reasons, neither of Plaintiffs' arbitration agreements are unconscionable with respect to arbitration fees and costs.

D. *Severability*

The parties contest whether, if this Court finds any of the provisions of the arbitration agreements to be unconscionable, it should sever those provisions or hold that the entire agreements are unenforceable. (Pls.' Opp'n at 18-19; Def's. Reply at 12).

"Courts are generally loath to upset the terms of an agreement and strive to give effect to the intent of the parties." *Zuver*, 153 Wash.2d at 320, 103 P.3d 753. However, unconscionable provisions may sometimes "taint" or "pervade" the entire arbitration agreement, *see id.*, or reveal an "insidious pattern" of seeking to tip the scales unfairly, *Adler*, 153 Wash.2d at 359, 103 P.3d 773, *quoting Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir.2003). In such cases, severance may be inappropriate and the arbitration agreement as a whole may be unenforceable. *Zuver*, 153 Wash.2d at 320, 103 P.3d 753; *see also Luna*, 236 F.Supp.2d at 1183.

The Court finds that these arbitration agreements are tainted with substantive unconscionability and that they cannot be enforced. Although some of the provisions are not so one-sided as to be offending, the unconscionable provisions reveal a pattern of attempting to deprive Defendant's customers of a way to enforce their rights against Defendant in a meaningful way. The fact that these are consumer claims brought for individually small sums of money

makes the damages limitations, class action prohibitions, and the attorneys' fees limitation in Plaintiff Mahowald's agreement unconscionable to the point of tainting these entire arbitration agreements with unconscionability. These provisions also threaten the strong public policy of protecting consumers in Washington State. This "fundamental unfairness" renders these entire agreements substantively unconscionable and therefore unenforceable. *See Luna*, 236 F.Supp.2d at 1183; *see also Janda v. T-Mobile, USA, Inc.*, --- F.Supp.2d ---, 2006 WL 708936 (N.D.Cal. Mar.17, 2006).

Conclusion

Plaintiff Lowden is bound by the service agreement that her ex-husband signed with Defendant T-Mobile. Plaintiff Mahowald is bound by the service agreement that Defendant asserts he would have been required to sign, because Mr. Mahowald has not placed the existence of that agreement "in issue" under the FAA. However, he is not bound by the terms of the "Welcome Guide" because Defendant has not substantiated its entitlement to arbitration based on that document.

Neither of Plaintiffs' arbitration agreements are procedurally unconscionable because each had a meaningful choice with respect to whether or not to enter into the agreements. However, the class action prohibitions, damages limitations, and attorneys' fees limitation are substantively unconscionable under Washington law, and their unconscionable purpose and effect pervades the arbitration agreements. Defendant's Motion to Compel Arbitration is DENIED.

APPENDIX C

T-MOBILE TERMS AND CONDITIONS

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3. Mandatory Arbitration: Dispute Resolution. ANY CLAIM OR DISPUTE BETWEEN YOU AND US ARISING UNDER OR IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, AND/OR OUR PROVISION TO YOU OF GOODS, SERVICE, OR UNITS SHALL BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") PURSUANT TO ITS PUBLISHED WIRELESS INDUSTRY ARBITRATION RULES, INCORPORATED HEREIN BY THIS REFERENCE AND AVAILABLE BY CALLING THE AAA AT 800-778-7879 OR VISITING ITS WEB SITE AT www.adr.org. Any arbitration proceeding shall be subject to the choice of law provision in paragraph 22. Notice of an arbitration commenced by you must be served on our registered agent. No party may act as a representative of other claimants or potential claimants in any dispute, and two or more individuals' disputes may not be consolidated or otherwise determined in one proceeding. An arbitrator may not award relief in excess of or inconsistent with the provisions of the Agreement, order consolidation or arbitration on a classwide basis, or award lost profits, punitive, incidental, or consequential damages or any other damages other than the prevailing party's direct damages, except that the arbitrator may order injunctive or declaratory relief pursuant to applicable law. All administrative expenses of an arbitration will be equally divided between you and Us, except if the claim is less than $1000, you will be obligated to pay only $25. If the claim is less than $25, We will pay all administrative

expenses. Each party agrees to pay the fees and costs of its own counsel, experts, and witnesses at the arbitration. Subject to the foregoing limitations on consolidated or classwide proceedings, you agree, however, that if you fail to timely pay amounts due, We may assign your account for collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement.

YOU ACKNOWLEDGE AND AGREE THAT THIS ARBITRATION PROVISION CONSTITUTES A WAIVER OF ANY RIGHT TO LOST PROFITS, PUNITIVE, SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL, OR TREBLE DAMAGES ("DISCLAIMED DAMAGES"), A JURY TRIAL OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A CLASS ACTION. IF FOR ANY REASON THIS ARBITRATION CLAUSE IS DEEMED INAPPLICABLE OR INVALID, YOU AND WE BOTH WAIVE ANY CLAIMS TO RECOVER DISCLAIMED DAMAGES AND ANY RIGHT TO PURSUE, OR PARTICIPATE AS A PLAINTIFF OR AS A CLASS MEMBER IN, CLAIMS ON A CLASSWIDE, CONSOLIDATED, OR REPRESENTATIVE BASIS.

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T-MOBILE TERMS AND CONDITIONS

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3. Mandatory Arbitration: Dispute Resolution. YOU WILL FIRST NEGOTIATE WITH US IN GOOD FAITH TO SETTLE ANY CLAIM OR DISPUTE BETWEEN YOU AND US IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OR OUR PROVISION TO YOU OF GOODS, SERVICES, OR UNITS ("CLAIM"). YOU MUST SEND A WRITTEN DESCRIPTION OF YOUR CLAIM TO OUR REGISTERED AGENT (See Sec. 22). IF YOU DO NOT REACH AGREEMENT WITH US WITHIN 30 DAYS, INSTEAD OF SUING IN COURT, YOU AGREE THAT ANY CLAIM MUST BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER ITS PUBLISHED WIRELESS INDUSTRY ARBITRATION RULES, WHICH ARE A PART OF THE AGREEMENT BY THIS REFERENCE AND ARE AVAILABLE BY CALLING THE AAA AT 800-778-7879 OR VISITING ITS WEB SITE AT www.adr.org. You must serve our registered agent (See Sec. 22) with a notice of an arbitration in order to begin an arbitration. This agreement to arbitrate extends to claims that you assert against other parties, including without limit equipment manufacturers and dealers, if you also assert claims against us in the same proceeding. The Agreement involves interstate commerce and despite the choice of law provision in Sec. 25, the Federal Arbitration Act and federal arbitration law govern arbitrations under the Agreement. An arbitrator may only award as much relief as a court having jurisdiction in the place of arbitration, limited to the same extent that a court would limit such relief and consistent with the provi-

sions of the Agreement. An arbitrator may order injunctive or declaratory relief (so long as that injunctive or declaratory relief does not apply beyond your dealings with us) or summary judgment under applicable law. AAA has a fee schedule for arbitrations. You will pay your share of the arbitrator's fees except: (a) for claims less than $25, we will pay all arbitrator's fees and (b) for claims between $25 and $1000, you will pay $25 for the arbitrator's fee. You and we agree to pay our own other fees, costs and expenses including those for counsel, experts, and witnesses. Visit www.adr.org arbitrator fee information in hardship circumstances.

Neither you nor we may be a representative of other potential claimants or a class of potential claimants in any dispute, nor may two or more individuals' disputes be consolidated or otherwise determined in one proceeding. While the prohibition on consolidated or classwide proceedings in this Sec. 3 will continue to apply: (a) you may take claims to small claims court, if they qualify for hearing by such court and (b) if you fail to timely pay amounts due, we may assign your account for collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement. YOU AND WE ACKNOWLEDGE AND AGREE THAT THIS SEC. 3 WAIVES ANY RIGHT TO A JURY TRIAL OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A CLASS ACTION. IF A COURT OR ARBITRATOR DETERMINES THAT YOUR WAIVER OF YOUR ABILITY TO PURSUE CLASS OR REPRESENTATIVE CLAIMS IS UNENFORCEABLE, THE ARBITRATION AGREEMENT WILL NOT APPLY AND OUR DISPUTE WILL BE RESOLVED BY A COURT

OF APPROPRIATE JURISDICTION, OTHER THAN A SMALL CLAIMS COURT. SHOULD ANY OTHER PROVISION OF THIS ARBITRATION AGREEMENT BE DEEMED UNENFORCEABLE, THAT PROVISION SHALL BE REMOVED, AND THE AGREEMENT SHALL OTHERWISE REMAIN BINDING.

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APPENDIX D

SERVICE AGREEMENT

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9. Mandatory Arbitration: Any controversy, claim or dispute between you and Company arising under this Agreement, excluding actions by Company to collect unpaid charges, shall be submitted to final, binding arbitration under the auspices of the American Arbitration Association ("AAA") pursuant to its published wireless industry arbitration rules, incorporated herein by this reference and available by calling the AAA at 800-778-7879 or visiting its web site at www.adr.org. Notice of an arbitration commenced by you shall be served on Company's registered agent. All claims shall be arbitrated individually and you agree that no person shall bring a punitive or certified class action to arbitration or seek to consolidate or bring previously consolidated claims in arbitration. The arbitrator shall have no authority to award punitive damages. YOU ACKNOWLEDGE THAT THIS ARBITRATION PROVISION CONSTITUTES A WAIVER OF ANY RIGHT TO A JURY TRIAL.

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